2016

Sharon Smith Petitioner/ Appellee, v. Keith Smith, Respondent/ Appellant.

Utah Court of Appeals

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

SHARON SMITH Petitioner/Appellee, v. KEITH SMITH, Respondent/Appellant.	Appeal No. 20150354 (Dist. Ct. Case No. 134300466)

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

Appeal from the Findings of Fact and Conclusions of Law and Decree of Divorce, each entered on March 26, 2015, by the Third Judicial District Court, the Honorable Robert W. Adkins presiding.

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RESPONSE TO CONDITIONAL CROSS APPEAL

Appellee states that she is conditionally cross appealing in this case, with the request that if this Court grants Keith's appeal and awards Keith half of the contested accounts, that the trial court should revisit its alimony award to take into account any change in the parties' need and ability to pay that may result from that change in the award of the funds at issue here. Keith does not disagree that, should he prevail on his appeal, the case should be remanded to the trial court with directions to revisit the equitable division of the marital estate and his award of alimony.

However, Sharon's claim on appeal that she might be entitled to alimony is unfounded insofar as she pled in her Petition that no alimony should be awarded to either party [R.2], and she did not otherwise preserve that issue with the trial court. *See Bell v. Bell*, 2013 UT App 248, ¶ 28, 312 P.3d 951, 957.

ARGUMENT

Sharon raises a number of abstract and convoluted arguments in her Appellee Brief, most of which were not raised or factually supported at the trial. But this appeal is not complicated. In its oral ruling and the written order, the trial court explicitly acknowledged that Schedule A to the Smith Family Trust governed the disposition of the two financial accounts at issue (a Zions Bank money market account and an LPL brokerage account, both held in Petitioner's name, the "Brokerage Accounts"). The trial

court interpreted the Financial Accounts Provision of Schedule A—which split all financial accounts equally—to not apply to the Brokerage Accounts. It erred. This appeal begins and ends with that analysis. Sharon's other arguments are misdirected, and do not address the actual issue on this appeal. Nevertheless, Keith will briefly address them in order.

I. The Only Relevant Inquiry is the Trial Court's Erroneous Interpretation of Schedule A.

Sharon makes only one argument that was actually addressed at trial—that the check Sharon received should be considered her "interest" in her family limited partnership, and therefore excluded from the operation of the Financial Accounts Provision of Schedule A. This was the argument of Plaintiff's counsel, [R.181:119], and the subject of Plaintiff's testimony, [R.181:25-29]. It is also the argument adopted by the trial court, but it is incorrect, as Keith has already explained in his Opening Brief.

Contrary to Sharon's argument (and her mischaracterization of Keith's arguments on this appeal), an interest in a limited partnership includes a right to receive distributions, but the actual funds once distributed are not the "interest" in the partnership. Once distributed, those funds are simply funds owned by the recipient, and are fungible with all other funds owned by that person. To state that those funds continue to be part of the partnership is incorrect and would lead to all kinds of legal mischief, and no law exists to create such a result.

Those funds certainly could be traced to the partnership, and Keith agrees that those funds would generally be considered Sharon's separate property in the absence of the Smith Family Trust (and particularly Schedule A) or other commingling, but it was legal error for the Court to interpret those funds are being "Sharon's interest" in the partnership, and therefore disregard the plain language of Schedule A of the Smith Family Trust. The impact of Schedule A is that half of all financial accounts, including the Brokerage Accounts, were Keith's separate property. The provision at issue, the Financial Accounts Provision, reads as follows:

> The following accounts in the following institutions, together with all future additions, interest or accumulations therein and also including **all new accounts** and the accumulations and the future additions, interest or accumulation **in any and all other financial institutions in which new accounts are opened in the future**..."

Trial Ex. 2, pg. 29 (emphasis added).

There are no missing terms, uncertain terms, or other facial deficiencies in the language, and Sharon has never argued that there are. As a result, the trial court should have looked solely to the "plain meaning" of that language inside the four corners of Schedule A. *Hull v. Wilcock*, 2012 UT App 223, ¶¶ 27-28, 285 P.3d 815, 823; *Makoff v. Makoff*, 528 P.2d 797, 798 (Utah 1974). The Financial Accounts Provision states that it covers "all new accounts...in any and all other financial institutions in which new accounts are opened in the future..." This language is comprehensive and all-encompassing, and leaves no room for any financial accounts to be excluded for any

reason. The trial court erred in its determination that the Brokerage Accounts were Sharon's separate property, and therefore erred in its distribution of those funds.

II. The Court Did not Make Any Equitable Distribution of the Brokerage Accounts.

Sharon argues that the trial court's ruling can be considered an "equitable distribution" of the Brokerage Accounts to Sharon, and affirmed on this basis. This argument lacks any evidentiary support and cannot be the basis for affirming the trial court's ruling. The trial court did not make any equitable distribution or any findings that would support or lead to such a distribution. Indeed, the lack of findings sufficient to support Sharon's argument would make such an undisclosed "equitable distribution" reversible error as a matter of law. *See Bell v. Bell*, 2013 UT App 248, ¶ 21, 312 P.3d 951, 956 (quoting *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988)). The trial court's ruling is clear that the award of the Brokerage Accounts to Sharon was governed by Exhibit A to the Smith Family Trust, and that the trial court interpreted that provision to not apply to the Brokerage Accounts. [R.181:146 (Trial Tr.); R.165-66.] In the face of a clear expression of the trial court's logic, this Court should not pretend that the trial court engaged in a different wholly different analysis. The trial court's determination that the Brokerage Accounts were Sharon's separate property was based on its erroneous interpretation of the Smith Family Trust and, therefore, is error.

III. Sharon's Alternative Interpretations of the Smith Family Trust Are Incorrect and Were Not Supported at Trial.

Sharon proposes a unique interpretation of the Smith Family Trust and Schedule A. These interpretations were not raised at trial, nor does Sharon cite to any record evidence (other than the Trust itself) to support her arguments. Moreover, her arguments should be rejected because they are not supported by the actual language of the Smith Family Trust and Schedule A.

Most of Sharon's arguments ask the Court to disregard Schedule A as a separate, self-contained document that merely lists assets governed by the language in the Smith Family Trust. Ignoring Schedule A, however, is not tenable. Schedule A, though denominated as a "schedule," is a stand-alone deed, signed separately and apart from the Smith Family Trust. There is no basis to look beyond the provisions of that deed to interpret its meaning. That deed provided that they would equally split

> The following accounts in the following institutions, together with all future additions, interest or accumulations therein and also including **all new accounts** and the accumulations and the future additions, interest or accumulation **in any and all other financial institutions in which new accounts are opened in the future**..."

Trial Ex. 2, pg. 29 (the "Financial Accounts Provision"). That deed also mentions the Limited Partnership, and states that Sharon alone is entitled to

> All interest of Sharon L. Smith in and to Luveda Fincher Family Limited Partnership, an Arizona Limited Partnership.

Trial Ex. 2, pg. 29. Contrary to Sharon's arguments, neither of these provisions is more "specific" than the other, and they both are entitled to equal effect. Nor do they overlap.

Again, contrary to Sharon's arguments, her "interest" in the limited partnership includes a right to receive distributions, but the distributed funds are not themselves the partnership interest. Once distributed, those funds are simply fungible money owned by the recipient, separate and apart from the continuing partnership interest itself. Sharon deeded half of all her then existing and future financial accounts to Keith, and when she deposited that money in the Brokerage Accounts, half became Keith's separate property under the plain language of Schedule A.

Sharon also argues that Schedule A does not have a separate line item for "future accounts" and, as a result, it does not allocate future accounts at all. This argument ignores the language of the deed, which identifies the existing accounts "together with" all future accounts, and divides them equally between Keith and Sharon. There can be no real dispute that the future accounts were to be treated identically with those specifically identified. Sharon's argument merely attempts to "create ambiguity" where none exists. *Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*, 2016 UT 6, ¶ 42, ---P.3d---. This is unavailing.

Leaving the language of Schedule A altogether, Sharon then argues that the "Additions to the Trust" provision should be interpreted to reach a result contrary to the language of Schedule A. She misreads the language of the Smith Family Trust,

attempting to reach the conclusion that *any* property Sharon chose to take possession of automatically became Sharon's separate property in her "sub-trust", bypassing Schedule A and the Smith Family Trust altogether. This is not how the Smith Family Trust works, and certainly does not harmonize the Smith Family Trust provisions and Schedule A.

Instead, Schedule A deeded half of the Brokerage Accounts to Keith's portion of the Smith Family Trust and half to Sharon's portion. The "Additions to the Trust" language Sharon cites and emphasizes actually supports and gives effect to this allocation:

> Any additional property received by the Trustee shall become a part of the Trust into which it is transferred and shall become subject to the terms of this Agreement.

Appellee Brief, pg. 15, citing R.78-79. The Brokerage Accounts were "transferred" in equal halves to each of Keith's and Sharon' "sub-trusts" pursuant to the quit-claim in Schedule A. Even if this Court were inclined to ignore Schedule A, the next sentence of that same provision mandates the exact same equal division:

> If such property is not specifically appointed to any particular Trust, it shall be allocated equally between the Keith L. Smith Trust and the Sharon L. Smith Trust, if both of the Trustors are living, and otherwise to the Shelter Trust set forth therein.

Appellee Brief at p. 15, citing R.78-79. Accordingly, regardless of the method, the outcome of the Smith Family Trust and Schedule A is an equal division of the Brokerage Accounts, and the trial court's contrary distribution is error.

IV. Sharon Did Not and Cannot Now Revoke Keith's Rights.

Sharon also argues that she was entitled, and remains entitled, to revoke the Smith Family Trust and pull assets back out of Keith's separate portion of the Smith Family Trust. Again, no evidence is cited that any "revocation" occurred, and certainly not one that actually complied with the operative language of the Smith Family Trust. The revocation language of the Smith Family Trust requires a written revocation (of which there is no evidence) and only allows Sharon to revoke her portion of the Smith Family Trust—not Keith's. The language Sharon cites states in full that

> As long as both of the Trustors are alive, each of them reserves the right, without the consent or approval of the other, to amend, modify or revoke their separate Trusts under this Agreement, in whole or in part, including this Trust, concerning the property that each has contributed to the Trust, in whole or in part, also including the principal and the present or past undisbursed income from such principal. Such revocation shall be by an instrument in writing signed by the Trustors and shall be effective upon signing without notice to any successor Trustee.

Appellee Brief, pg. 28, citing R.80. The Smith Family Trusts only allows Sharon to revoke her separate portion of the Smith Family Trust. It does not permit her to reach into Keith's portion to revoke it as well and help herself to his separate assets. Sharon did not revoke the Smith Family Trust prior to funding the Brokerage Accounts, and cannot do so retroactively. Notably, in another argument Sharon complains that Keith's reading of Schedule A would render her unable to do anything with the distributions she received from the limited partnership. This is untrue. Sharon could have properly revoked her portion of the Smith Family Trust prior to creating those Brokerage

Accounts, and possibly undone Schedule A.[1] However, she would also have to give up any of the benefits of the Smith Family Trust. She chose not to do so, and cannot have it both ways.

Conclusion

Because the Trial Court's Decree distributing the Brokerage Accounts was based solely on its erroneous interpretation of the Smith Family Trust and Schedule A, the Trial Court's ruling should be reversed and remanded to divide the Brokerage Accounts equally between the parties.

DATED this 4th day of April, 2016.

PARR BROWN GEE & LOVELESS, P.C.

By: _____
Michael D. Black
Attorneys for Appellant

[1] Keith expresses no opinion on whether or how Schedule A, a deed, could be undone, as that was never raised at trial and is not a proper issue here.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of April, 2016, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE** was served via first-class U.S. mail, postage prepaid, upon the following:

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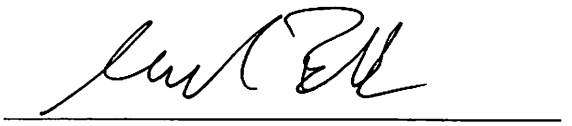

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Rule 24(f), I hereby certify that this Appellant Brief contains no more than 7,000 words, exclusive of table of contents table of citations, and any addendum containing statutes, rules, regulations or portions of the record. The actual number of words according to the word processing system used to prepare the brief is 2593.